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Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System: Standards of Practice, Voluntary Training, and Caseload Limits in Response to HB 2735

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Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System

*Standards of Practice, Voluntary Training, and Caseload Limits in
Response to HB 2735*

Statewide Children's Representation Workgroup

Appointed by the Washington Supreme Court Commission on Children in Foster Care

Statewide Children's Representation Workgroup

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*Each agency had one appointed member and was allowed to name a person to serve as an alternate in the event that its appointed representative was unavailable to attend. Michael Griesedieck served as alternate for Steven Hassett in representing the Attorney General's Office. Lori Irwin served as alternate for Heidi Nagel of the King County Dependency CASA. Jill Malat served as alternate for Christie Hedman of WDA. Erin Shea McCann served as alternate for Casey Trupin of Columbia Legal Services.

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Introduction

The Children's Representation Workgroup (hereinafter, "the Workgroup") was appointed and charged by the Washington State Supreme Court Commission on Children in Foster Care (hereinafter, "the Commission") to propose recommendations regarding practice standards for attorneys representing youth in proceedings under RCW 13.34.

Section 5 of HB 2735, quoted below, was the impetus for this work:

By December 31, 2010, and within available resources, the administrative office of the courts, working in coordination with the state supreme court commission on children in foster care, shall develop recommendations for voluntary training and caseload standards for attorneys who represent youth in dependency proceedings under chapter 13.34 RCW. The administrative office of the courts shall report its recommendations to the appropriate committees of the legislature by December 31, 2010.

In the purpose section of HB 2735, the Legislature recognized:

...that when children are provided attorneys in their dependency and termination proceedings, it is imperative to provide them with well-trained advocates so that their legal rights around health, safety, and well-being are protected. Attorneys, who have different skills and obligations than guardians ad litem and court-appointed special advocates, especially in forming a confidential and privileged relationship with a child, should be trained in meaningful and effective child advocacy, the child welfare system and services available to a child client, child and adolescent brain development, child and adolescent mental health, and the distinct legal rights of dependent youth, among other things. Well-trained attorneys can provide legal counsel to a child on issues such as placement options, visitation rights, educational rights, access to services while in care and services available to a child upon aging out of care. Well-trained attorneys for a child can:

- (a) Ensure the child's voice is considered in judicial proceedings;
- (b) Engage the child in his or her legal proceedings;
- (c) Explain to the child his or her legal rights;
- (d) Assist the child, through the attorney's counseling role, to consider the consequences of different decisions; and
- (e) Encourage accountability, when appropriate, among the different systems that provide services to children.

Section 1 of HB 2735 referred to attorneys for "children" and Section 5 referred to attorneys for "youth." RCW13.34.100 currently contemplates the discretionary appointment of attorneys for children at any age if requested by the Guardian Ad Litem or brought up by the Court, *sua sponte*, though only children age twelve and older can request counsel. Practices vary throughout the state and Juvenile Court Rule 9.2 mandates appointment without respect to age when there is no guardian ad litem and a party or the court moves for appointment. Therefore, the Workgroup set out to craft standards that would apply any time that an attorney was appointed to represent a child, whatever his or her age.

Bearing in mind HB 2735's charge and purposes, the Workgroup divided into three sub-workgroups focused on these three issues: 1) voluntary training standards; 2) caseload standards; and 3) general

practice standards for the attorney representing children in dependency and termination proceedings. Each sub-workgroup circulated and reported their work to the Workgroup as a whole, discussion ensued and new drafts were proposed and circulated until a consensus of the entire group was achieved. On a few occasions, members of the Workgroup believed that a clearer understanding of the standards required Commentary explaining the bases upon which the standards were formed or a minority view surfaced that required acknowledgment in order to achieve agreement. Accordingly, the Standards include a few sections of Commentary.

By working in sub-workgroups and reporting out to the whole, members were able to focus their efforts and review the literature and research in each of their areas as well as draw upon their own considerable expertise and familiarity with the needs of Washington State. The wisdom of the entire group was also brought to bear in collegial and challenging discussions in which sub-workgroup members were required to explain to their colleagues the bases for their recommendations.

After reviewing the ABA Standards of Practice for Attorneys Representing Children in Abuse and Neglect Proceedings,¹ the National Association of Counsel for Children Standards,² the ABA Model Act³ and the QIC-Child Representation Standards from the University of Michigan,⁴ the Practice Standards sub-workgroup chose to use the ABA Standards of Practice as its framework, although sections have been added and subtracted to suit the needs and realities of Washington State.

The Caseload Standards sub-workgroup reviewed the practices of other states as well as Washington's own standards established by the Office of Public Defense's Parent Representation Project. Ultimately, the Caseloads Standards sub-workgroup chose to base its recommendations on the Office of Public Defense Parent Representation Project with some alteration to recognize the different types of proceedings in which a child's attorney may also become involved.

Finally, the Training sub-workgroup considered the National Association of Children's Counsel's (hereinafter, "the NACC") training certification program, syllabi used in the Children and Youth Advocacy Clinic and Seminar at the University of Washington School of Law, trainings developed by Court Appointed Special Advocates (CASA), the Washington Defender Association and the Court Improvement Training Academy as well as the requirements in place at other states. Ultimately the Training sub-workgroup recommendations were informed by all of these programs as well as the pre-existing continuing legal education requirements for Washington State attorneys.

These final recommendations represent the consensus views of the members of the entire workgroup on each of the three tasks before it. The Chair has merged the work of the Caseload Standards sub-workgroup into the Practice Standards sub-workgroup document. While this document references a Voluntary Training Program in Section 1.2, the recommendations of the Training sub-workgroup stand on their own as a recommended program and are contained in a separate document.

¹ Attached in Supporting Documents Sections of this Report.

² NACC standards can be accessed by clicking on the link at the bottom of the page at <http://www.naccchildlaw.org/?page=PracticeStandards>.

³ The ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings can be accessed at http://www.abanet.org/litigation/standards/docs/child_modelact.pdf.

⁴ "The *QIC-ChildRep*, is a five-year, 5 million dollar project to gather, develop and communicate knowledge on child representation, promote consensus on the role of the child's legal representative, and provide one of the first empirically-based analyses of how legal representation for the child might best be delivered." See, <http://www.improvechildrep.org/Home.aspx>. It is housed at the University of Michigan School of Law and funded by the U.S. Children's Bureau. It has promulgated a model, grounded largely in the ABA standards, upon which it intends to base its empirical research. This model can be found at: <http://www.improvechildrep.org/DemonstrationProjects/QICChildRepBestPracticeModel.aspx>.

Executive Summary

The Children's Representation Workgroup (hereinafter, "the Workgroup") was appointed and charged by the Washington State Supreme Court Commission on Children in Foster Care to propose recommendations regarding practice standards for attorneys representing youth in proceedings under RCW 13.34. The practice standards listed in this report are modeled after the ABA Standards of Practice for Attorneys Representing Children in Abuse and Neglect Proceedings and are the result of Workgroup consensus. These standards are designed to be applicable throughout the state any time that an attorney is appointed to represent a child of any age. The attorney remains bound at all times by the Washington State Rules of Professional Conduct as well.

Section 1: General Duties

It is vitally important for the attorney to gain the child's trust and confidence and doing so requires the attorney to structure communication to account for the child's age, developmental level, and cultural context. Furthermore, attorneys have a duty to provide legal counsel to the child in an age and developmentally appropriate manner and should represent the child's stated interests throughout the course of litigation. Due to limited resources, attorneys may be appointed to represent more than one child in a sibling group so long as doing so does not create a conflict of interest. Attorneys should receive interdisciplinary training and should represent clients throughout the duration of a case. To ensure that attorneys can effectively represent and communicate with their clients, attorneys should have a caseload of no more than sixty clients at a time, involving a total of eighty cases. This maximum caseload standard is based on a series of assumptions that are set forth more fully in the standards and if any of these assumptions are not met in the individual attorney's situation, the number of clients and cases should be adjusted downward accordingly.

Section 2: Relationship/Communication with the Child

Attorneys should maintain sufficient and frequent contact with their clients, including communicating in person. Attorneys should provide legal counsel in a manner that is age and developmentally appropriate and respectful of the child's parents, family and cultural background.

Section 3: Communication with Other Professionals

Attorneys should communicate regularly with professionals involved in the child's dependency or termination case, including social workers, case managers, and professionals at the child's school.

Section 4: Discovery and Court Preparation

Attorneys should visit their client prior to court hearings and when informed of emergencies or significant events impacting the child. Attorneys should investigate issues relating to the case, develop a strategy to implement at hearings, file pleadings in a timely manner, and fully participate in settlement negotiations.

Section 5: Hearings

Attorneys have a duty to diligently represent their client at all hearings and to participate in all conferences with the court involving their client. Attorneys should explain to their client what is expected to happen before, during, and after each hearing. Attorneys should advise the child on the nature of the hearing and follow the child's decision regarding whether or not he or she will attend the court hearing. Attorneys should be fully aware of the child's competency in regards to testifying, counsel the child regarding a decision to call the child as a witness, and fully prepare the child to testify before the court.

Section 6: Advocacy for Services

Consistent with the child's stated interest, the child's attorney should seek appropriate child welfare services and implement a service plan. Also, attorneys should ensure that children with special needs receive appropriate services to address physical, mental, and developmental disabilities.

Section 7: Post Hearings/Appeals

Attorneys should review all court orders and monitor their implementation. Attorneys should discuss the consequences of court orders with the child in an age and developmentally appropriate manner and discuss with the child the possibility of appeal. When a decision is received, attorneys should meet with their client, explain the outcome of the case, and discuss the end of the legal representation process.

Section 8: Withdrawal and Termination of Representation

Attorneys should close the case and withdraw from representation when a final resolution of the case and permanency has been achieved and the attorney's responsibilities to the client have been completed. If necessary, attorneys must obtain a court order allowing withdrawal prior to case resolution.

Voluntary Training Recommendations

Attorneys should participate in a minimum of forty hours of initial training over a three-year period. No less than ten of these hours are to be completed each year and no more than one-third of training is to be completed via video, webinar or teleconference. An additional ten hours of training should be completed each year to maintain currency. The Workgroup recommends that a certificate be awarded to verify when a course of study has been completed and that an entity such as the Administrative Office of the Courts issue the certificates. Finally, trainings should be conducted by qualified individuals.

Child Representation Practice Standards

PREFACE

All children subject to dependency or termination of parental rights court proceedings should have legal representation as long as the court jurisdiction continues. These Child Representation Standards are meant to apply when a lawyer is appointed for a child in any legal action based on RCW 13.34 and 13.36 (guardianship).

These standards are not meant to supplant the professional judgment of an attorney or the requirements set forth in the Rules of Professional Conduct.

Commentary

RCW 13.36 was recently added in the 2010 session to replace Washington State's former dependency guardianship system and allow for a dependency action to be dismissed after the successful appointment of a guardian through a 13.36 petition. The Workgroup wanted to be clear that these standards should pertain to an attorney's activities representing a child in the guardianship proceedings that resulted from a dependency proceeding as well as within those actions covered by RCW 13.34.

1. General Duties

1.1 Role of Child's Attorney

The child's trust and confidence in the decision making process is often a function of the responsiveness of that process. The child's attorney may be the first contact the child has with the process; therefore the attorney has a critical role in developing and guarding the child's trust, confidence and participation in the process including basing decision making within the attorney-client relationship on respect for the child's capacity to make informed decisions. A lawyer who provides legal services for a child owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client:

- (1) The child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, developmental level, level of education, cultural context, disability if any, and degree of language acquisition.
- (2) The child's attorney should determine whether the child's capacity to make adequately considered decisions in connection with a representation is diminished pursuant to the Rules of Professional Conduct (RPC 1.14), with respect to each issue in which the child is called upon to direct the representation. For the purposes of child representation in dependency and termination of parental rights proceedings, a determination of "diminished capacity" should never be based solely on the child's chronological age.
- (3) The child's attorney should elicit the child's preferences, provide counsel and advise the child, in a developmentally appropriate manner.
- (4) As counselor and advisor, the attorney should provide the child with an informed understanding of the child's legal rights and obligations and explain their practical implications. The attorney should explain all aspects of the case and provide comprehensive counsel and advice on the advantages and disadvantages of different case options to assist the child in identifying case goals and making informed decisions. During these discussions, the attorney should address the child's legal rights and interests as well as issues regarding the child's safety, health and welfare. At the same time, the attorney should be

careful not to usurp the child's authority to decide and direct efforts to achieve the case goals consistent with RPC 1.2 and 1.4.

(5) The child's attorney should be fully informed about racial disproportionality in the child welfare system, and affirmatively represent his/her client to prevent adverse consequence of institutional bias. The attorney should also be fully aware of his or her own personal biases and the potential impact these may have on the conduct of his or her representation and the discharge of ethical duties to his or her client.

(6) The child's attorney should represent the child's stated interest and follow the child's direction throughout the course of litigation.

(7) If the child is pre-verbal or unable to communicate a stated interest, the determination of the child's legal interests should be based on the laws that are related to the purposes of the proceedings, the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.

(8) The child's attorney should attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child consistent with the child's stated interest.

(9) Due to limited resources for child representation an attorney may be appointed to represent more than one child in a sibling group. As this situation can raise issues regarding a conflict of interest an attorney must diligently comply with RPC's addressing conflict of interest and specifically RPC 1.7 and RPC 1.8. Ultimately, the appointed attorney must consider the circumstances of the case and determine whether or not he or she can effectively and ethically represent more than one child in a sibling group.

Commentary

Section (7) seeks to describe the attorney's role in those cases in which she or he represents a child who is pre-verbal or otherwise unable to communicate. Given RCW 13.34.100(6) which contemplates appointment of counsel for children twelve years of age and older, it is the unusual case that an attorney finds him or herself representing a pre-verbal or nonverbal child. However, it is not impossible for such a case to arise. For example, under Juvenile Court Rule 9.2, the court must appoint counsel for any child who does not have a GAL upon motion of any party. In addition, even the child over the age of twelve may suffer from a disability that precludes communication with counsel. There were those in the Workgroup who believed that in such a case the only option ought to be an appointment of a guardian ad litem, reasoning that this would be the procedure used for an adult client who was unable to communicate with counsel. However, it was pointed out that in Washington State it is likely that the GAL who would be appointed for the child would likely not be an attorney, given the practice of using CASA in this role, and that therefore, even if a GAL were to be appointed, there would still be a need for counsel for the child.

Section 7 seeks to place such an attorney in the role of advocating for the child's legal interest. The child's legal interest is somewhat distinct from either his or her stated or best interest. Rather, it is a role that looks to the purpose of the underlying laws governing whatever the stage of the proceedings and seeks to secure the child's rights within those proceedings. Our Section (7) includes the purposes of the law as a guiding principle together with advocacy for "the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available."

1.2 Education, Training & Experience

Counsel must be qualified through training or experience to effectively fulfill the duties of representing children in child welfare proceedings. As set forth in the Recommended Voluntary Training Standards Report, counsel must acquire sufficient knowledge in a wide range of subject areas including but not limited to:

- (1) All relevant federal and state laws, regulations, policies, rules, and relevant court decisions;
- (2) Infant, young child, and adolescent development needs and abilities, including the impact of trauma and disability;
- (3) Developmentally appropriate interviewing and counseling skills;
- (4) The role of the attorney for the child and his or her ethical responsibilities to the client;
- (5) Racial disproportionality within the child welfare system;
- (6) Other biases that operate within the child welfare system and the justice system itself that could interfere with the ability of the attorney to successfully advocate for the child's stated interest;
- (7) Cultural competency;
- (8) The types of experts who can consult with attorneys on various case issues;
- (9) Family dynamics and dysfunction such as substance abuse, domestic violence and mental health;
- (10) Child welfare and family preservation services available in the community;
- (11) The role and authority of the Division of Children and Family Services and both public and private organizations within the child welfare system; and
- (12) An awareness and appropriate level of understanding of the ancillary legal systems and issues that impact children and youth in the dependency system, such as educational issues, family law, juvenile offender matters, public benefits and immigration.

1.3 Continuity of Representation

It is expected that the attorney of record shall continue to represent the child from the initial court proceeding through all subsequent dependency and/or termination proceedings until resolution, and permanency is achieved.

1.4 Caseloads

Full-time attorneys representing children in dependency and termination hearings should handle no more than sixty clients at a time, involving a total of eighty cases. Each child must be considered a separate client, even if the attorney does represent his or her siblings. It is expected that children's attorneys will adhere to the Children's Representation Practice Standards.

The following key assumptions or expectations are critical to allowing the attorney to handle the maximum client load standard of sixty. To the extent that any of these assumptions do not reflect the reality of the attorney's practice, the number of clients should be decreased to a number lower than sixty to accommodate the individual attorney's practice:

- (1) The Standard assumes that attorneys appointed to represent youth in dependency proceedings will have commensurate knowledge, training, experience, and ability to communicate effectively with children.
- (2) The Standard assumes that attorneys appointed to represent youth in dependency proceedings will have access to adequate social work and clerical support as well as office space, computer access and means of transportation to visit clients.

(3) The Standard assumes that contracts for representation of children in dependency proceedings will contain provisions that address compensation for extraordinary cases that take an extraordinary amount of preparation and time.⁵

(4) It is expected that attorneys for children in dependency proceedings will participate in the children's representation training program and that if an attorney needs additional training at the beginning of a contract in order to improve his or her skills, such training will be built into the contract hours and compensation.

(5) This recommended caseload assumes that the attorney's entire practice is devoted to the representation of children involved in RCW 13.34 proceedings. If a children's attorney has a part-time children's representation contract, the children's representation contract must be based on the actual percentage of time available for children's cases, and the attorney must devote the appropriate number of hours to his or her children's cases each week.

(6) This recommended caseload assumes that the attorney will not represent the child on appeal but that s/he will advise his or her client regarding his or her right to appeal, will assist the child in finding counsel for appeal, and will confer with any appellate counsel to ensure that the child's goals and objectives are carried forward into the appeal.

Commentary

Legal representation is rendered meaningless and ineffective if the caseload of an attorney is not reasonably related to the actual work that must be done to represent his or her client. The representation of children and youth in the dependency contexts requires a trained attorney to spend significant time building a relationship of trust with his or her client and making sure that the client understands a complex proceeding that has dramatic consequences in his or her life.

This caseload recommendation includes 60 ongoing dependency cases and 20 additional or collateral representations, comprising terminations, guardianships, reinstatement proceedings, authorized family law proceedings, and administrative or judicial proceedings. Each child client is counted individually, taking care in the event of sibling group representation, to count each individual child as his or her own representation.

This caseload recommendation is based on (1) the research surveys and experience of the Parents' Representation Project (PRP) of the Washington State Office of Public Defense (OPD), and (2) a survey taken of attorneys who currently represent dependent youth in Washington State. The OPD caseload standard is also 80 cases comprised of a combination of dependency and termination proceedings, resulting in an average of sixty clients per attorney.⁶ The workgroup conducted a survey of their own in which Washington attorneys who currently represent both youth and parents were asked dependency proceeding questions relating to representation of both these groups. Based upon the attorneys who responded, the survey indicated youth clients presented approximately the same complexity requiring approximately the same time commitments as adult clients. A significant minority of respondents, however, believed that youth clients present significantly greater time expenditures than adult clients, particularly if youth have legal or capacity complications arising from mental health conditions, educational delays, substance abuse issues, or criminal acts, or if youth are placed at a great distance from the attorney or have difficulty accessing services.

⁵ See, RCW 10.101.060.

⁶ Washington State Office of Public Defense Parent's Representation Program Standards of Representation, 2009. Available at <http://www.opd.wa.gov/ParentsRepresentation/090401%20Program%20Attorney%20Standards.pdf>

2. Relationship/Communication with the Child

The attorney should be aware of the unique developmental issues facing the child and take appropriate steps to ensure that these issues do not interfere with effective representation.

In all cases counsel must maintain sufficient and frequent contact with the child to establish a trusting relationship and maintain an attorney-client relationship that will enable counsel to understand the child's interests and needs, as well as the child's position on issues or questions in the case. Communication should include the following elements:

- (1) Provide the child and the child's caretaker with contact information in writing and establish a message system that allows regular attorney-client contact.
- (2) Counsel should meet with the child in person well before court hearings at which the substantive interests of the child are at issue. An initial meeting between shelter care and the case conference is particularly important in establishing a trusting relationship with the child and gaining an understanding of the child's interests. At these meetings, counsel should listen to the child's understanding of the case and fully answer the child's questions. Counsel should visit or meet at least once in the child's home/current placement. If the child's placement changes during the proceeding, the attorney should visit or meet the child in the new placement as well.
- (3) Counsel will speak respectfully regarding the child's parents, family and cultural background.
- (4) Counsel should advise the child about all legal matters related to the case in a developmentally appropriate manner. Depending on the child's age and functioning, multiple meetings of short duration may be required to fully discuss the service plan, the child's rights and potential consequences in the pending proceeding, any orders entered regarding expectations of the child and the potential consequences of failing to obey court orders or cooperate with service plans.
- (5) Counsel will adhere to the Rules of Professional Conduct (RPC) 1.6, and other laws related to confidentiality and the disclosure of client information.

3. Communication with Other Professionals

Child welfare cases require the child's attorney to communicate regularly with numerous professionals involved in the child's dependency or termination case, as well as attorneys who may represent the child in offender matters, truancy, or other cases. Some of these individuals are parties to the proceeding and represented by counsel, while many others are not. The attorney should provide the child's assigned social worker or case manager with the attorney's contact information. The attorney should establish a professional, working relationship with the social worker or case manager to facilitate the prompt and effective resolution of matters related to the child's case.

The attorney should communicate regularly with other parties and professionals, including professionals at the child's school, involved in their client's case as required to obtain current information regarding the child. While dependency proceedings may at times appear informal, it is important that all counsel fully respect the attorney-client relationship and abide by the RPC's governing communication with other parties to the proceeding, and communications with third parties.

4. Discovery and Court Preparation

4.1 Meet with Child

Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

4.2 Investigate

To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

- (1) Obtaining copies of all pleadings and relevant notices;
- (2) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;
- (3) Informing other parties and their representatives, including guardians ad litem and court appointed special advocates, that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
- (4) Participating in depositions, negotiations, discovery, pretrial conferences, and hearings; conduct a thorough and independent investigation at every stage of the proceeding and when appropriate utilize expert services as needed;
- (5) Counseling the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;
- (6) Identifying appropriate family and professional resources for the child;
- (7) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;
- (8) Obtaining necessary authorizations for the release of information;
- (9) Interviewing individuals involved with the child, including child welfare case workers, court appointed special advocates or guardians ad litem, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;
- (10) Reviewing relevant photographs, video or audio tapes and other evidence;
- (11) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed; and
- (12) Developing a theory and strategy of the case to implement at hearings, including factual and legal issues.

4.3 File Pleadings

The child's attorney should timely file pleadings such as: petitions, reports, declarations motions, responses or objections as necessary to advocate for the child's stated interest. Relief requested may include, but is not limited to:

- (1) A mental or physical examination of a party or the child;
- (2) A parenting, custody or visitation evaluation;
- (3) An increase, decrease, or termination of contact or visitation;
- (4) Restraining or enjoining a change of placement;
- (5) Contempt for non-compliance with a court order;
- (6) Termination of the parent-child relationship;
- (7) Reinstatement of parental rights
- (8) Establishment of paternity and child support;
- (9) A protective order concerning the child's privileged communications or tangible or intangible property;
- (10) Request services for child or family; and
- (11) Dismissal of petitions or motions.

4.4 Negotiate Settlements

The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child and in a manner consistent with the child's stated interest. The child's attorney should use suitable mediation resources.

5. Hearings

5.1 Court Appearances

The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child. If a child is attending a court hearing the attorney must appear in person.

During any hearing or trial, counsel has a professional duty to diligently represent his or her client. This includes, but is not limited to, the following:

- (1) Prepare and make all appropriate motions, including *motions in limine* with accompanying briefs if necessary, and evidentiary objections to advance the child's position at trial or hearing and to preserve issues for appeal;
- (2) Present and cross-examine witnesses, including experts as necessary, prepare and present exhibits;
- (3) Request the opportunity to make opening and closing arguments;
- (4) Prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision or may otherwise benefit the client; and
- (5) Avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.

5.2 Client Explanation

The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

5.3 Child at Hearing

In most circumstances, the child should be present at court hearings at which the substantive interests of the child are at issue, regardless of whether the child will testify. The child's attorney shall consult with the child prior to each scheduled hearing to ensure that the child understands his or her right to be present

at the hearing, to advise the child on the nature of the hearing, and to determine whether the child wishes to be present. After consultation, the attorney shall follow the child's decision regarding whether he or she will attend the court hearing.

5.4 Whether Child Should Testify

The attorney's responsibility for developing and guarding the child's trust, confidence and participation in decision-making is particularly important when it comes to the decision of whether a child should testify in a dependency or termination proceeding. Consistent with RPC 1.2 and 1.4, the child's attorney shall fully counsel and advise the child regarding a decision whether or not to call the child as a witness. First among the factors that should be considered is the child's need or desire to testify. Other factors include, but are not limited to, potential repercussions of testifying or not testifying, including potential criminal/juvenile offender liability, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination.

5.5 Child Witness

The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child. The child's attorney will work with other parties who may call the child as a witness to ensure as much as possible that the child is afforded an opportunity to testify in a manner that safeguards the child's emotional well-being and legal interests. The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

5.6 Challenges to Child's Testimony/Statements

The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

5.7 Conclusion of Hearing

If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

5.8 Expanded Scope of Representation

The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, to further the child's stated interest.

6. Advocacy for Services

6.1 Services

Consistent with the child's stated interest, the child's attorney should seek appropriate child welfare services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:

- (1) Family preservation-related prevention or reunification services;
- (2) Sibling and parental visitation;
- (3) Child support;
- (4) Domestic violence prevention, intervention, and treatment;
- (5) Medical and mental health care;
- (6) Drug and alcohol treatment;

- (7) Parenting education;
- (8) Semi-independent and independent living services;
- (9) Long-term foster care;
- (10) Termination of parental rights action;
- (11) Adoption services;
- (12) Education;
- (13) Recreational or social services;
- (14) Housing;
- (15) Food and clothing.

6.2 Special Needs

Consistent with the child's stated interest, the child's attorney should ensure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:

- (1) Special education and related services;
- (2) Supplemental security income (SSI) to help support needed services;
- (3) Therapeutic foster or group home care; and
- (4) Residential/in-patient and out-patient psychiatric treatment.

7. Post Hearings/Appeals

7.1 Review of Court's Order

The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

7.2 Communicate Order to Child

The child's attorney should discuss the order and its consequences with the child.

7.3 Implementation

The child's attorney should monitor the implementation of the court's orders, take reasonable steps to ensure that all parties comply with the court's order, assess and investigate material changes in circumstances that affect the child's stated interests and the effective implementation of court orders, and determine whether the case needs to be brought back to court.

7.4 Decision to Appeal

The child's attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and there is a basis in law and fact for doing so the lawyer should take all steps necessary to perfect and initiate the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

7.5 Participation in Appeal

Whether an appeal is filed on behalf of the child or by another party, the child's attorney should take necessary steps to ensure that the appropriate appointing authority is aware of the child's request/need to be appointed appellate counsel. Counsel for the child shall also file all necessary documents for the appointment of counsel on appeal and coordinate with the child's appellate counsel to assure that appropriate steps are taken to protect the client's interests while the appeal is pending.

7.6 Conclusion of Appeal

When the decision is received, the child's attorney should meet with the child and explain the outcome of the case.

7.7 Cessation of Representation

The child's attorney should discuss the end of the legal representation and determine what contacts, if any, the child's attorney and the child will continue to have.

8. Withdrawal and Termination of Representation

8.1 Withdrawal upon Resolution of Case

The attorney shall close case and withdraw from representation in a timely manner when a final resolution of the case and permanency has been achieved and the attorney's responsibilities to the client have been completed. In general, the attorney should close the case and withdraw from representation within 30 days of entry of a final order.

8.2 Withdrawal Prior to Resolution of Case

(1) If circumstances necessitate the attorney's withdrawal prior to resolution of the case, counsel shall obtain a court order allowing withdrawal and substitution of attorney. The attorney must serve the child and all parties with notice of intent to withdraw and date and time of motion. If motion to withdraw is granted, the attorney shall take reasonable steps to protect the client's interests and arrange for the orderly transfer of the client's file and discovery to substituting counsel.

(2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Voluntary Training Recommendations

40 Training Hours Over Three Years

The Children's Representation Workgroup recommends a minimum of 40 hours of initial training over a three-year period. During this initial three year training period, no less than 10 hours of training should be completed each year. No more than 1/3 of the recommended training may be via video, webinar or teleconference. Topics for initial training and recommended time are set out in detail in Attachment A to this recommendation. Upon completion of the initial training, attorneys will receive a "certificate of completed training" (see below). In addition to the initial 40 hours of training for the first three years, 10 hours of additional child welfare related training per year should be completed to maintain currency. As with the initial 40 hours of training, no more than 1/3 of the recommended training to maintain currency may be via video, webinar, or teleconference.

Certificate of Completed Training

The Workgroup recommends that a certificate of completion be used as a means of verifying that a course of study has been completed as opposed to formally certifying lawyers by attempting to make qualitative judgments about an individual's practice.

A group issuing certificates of completion would need, at a minimum, to undertake the responsibility for 1) determining what trainings qualify towards certification, 2) determine when the initial 40 hours of training is complete, 3) maintain a list of individuals who received certificates and, 4) verify that continuing training requirements are met. An entity such as the Administrative Office of the Courts might be in the best position to undertake such a role, as it is a neutral body with experience in administering continuing education programs. Consideration was also given to certification being hosted by the WSBA, WA Supreme Court, or through a system of self-regulation or report.

The Workgroup further recommends that all attorneys, regardless of experience level, complete the initial 40 hours of study to promote consistency in practice, build a common framework for the youth representation bar, and as a means of adding value to the trainings for all attending. The Workgroup further recommends that credit be given towards the initial 40-hour training requirement for training or coursework done within three years prior to a request for a certificate of completed training. This may include law school classes or training for law students which meet the standards as set forth by the certifying body. Any such credit should be given on a case-by-case basis by the certifying authority.

Quality of Training

The quality of training is as important as the topics trained. When possible, training should be conducted by individuals with a minimum of five years experience in their respective fields. Trainers should be familiar with principles of adult learning, and should strive to engage participants in multiple styles of learning.

APPENDIX A

HOUSE BILL 2735

CERTIFICATION OF ENROLLMENT

HOUSE BILL 2735

Chapter 180, Laws of 2010

61st Legislature
2010 Regular Session

DEPENDENCY PROCEEDINGS--CHILDREN'S REPRESENTATION

EFFECTIVE DATE: 06/10/10

Passed by the House February 13, 2010
Yeas 95 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 5, 2010
Yeas 47 Nays 0

BRAD OWEN

President of the Senate

Approved March 23, 2010, 2:31 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 2735** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 23, 2010

**Secretary of State
State of Washington**

HOUSE BILL 2735

Passed Legislature - 2010 Regular Session

State of Washington

61st Legislature

2010 Regular Session

By Representatives Goodman, Appleton, Rolfes, Seaquist, Finn, Rodne, Williams, Haigh, Pettigrew, Nelson, Darneille, Hasegawa, and Ormsby

Read first time 01/13/10. Referred to Committee on Judiciary.

1 AN ACT Relating to the representation of children in dependency
2 matters; amending RCW 13.34.100, 13.34.105, and 13.34.215; and creating
3 new sections.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** (1) The legislature recognizes that
6 inconsistent practices in and among counties in Washington have
7 resulted in few children being notified of their right to request legal
8 counsel in their dependency and termination proceedings under RCW
9 13.34.100.

10 (2) The legislature recognizes that when children are provided
11 attorneys in their dependency and termination proceedings, it is
12 imperative to provide them with well-trained advocates so that their
13 legal rights around health, safety, and well-being are protected.
14 Attorneys, who have different skills and obligations than guardians ad
15 litem and court-appointed special advocates, especially in forming a
16 confidential and privileged relationship with a child, should be
17 trained in meaningful and effective child advocacy, the child welfare
18 system and services available to a child client, child and adolescent
19 brain development, child and adolescent mental health, and the distinct

1 legal rights of dependent youth, among other things. Well-trained
2 attorneys can provide legal counsel to a child on issues such as
3 placement options, visitation rights, educational rights, access to
4 services while in care and services available to a child upon aging out
5 of care. Well-trained attorneys for a child can:

- 6 (a) Ensure the child's voice is considered in judicial proceedings;
- 7 (b) Engage the child in his or her legal proceedings;
- 8 (c) Explain to the child his or her legal rights;
- 9 (d) Assist the child, through the attorney's counseling role, to
10 consider the consequences of different decisions; and
- 11 (e) Encourage accountability, when appropriate, among the different
12 systems that provide services to children.

13 **Sec. 2.** RCW 13.34.100 and 2009 c 480 s 2 are each amended to read
14 as follows:

15 (1) The court shall appoint a guardian ad litem for a child who is
16 the subject of an action under this chapter, unless a court for good
17 cause finds the appointment unnecessary. The requirement of a guardian
18 ad litem may be deemed satisfied if the child is represented by
19 independent counsel in the proceedings. The court shall attempt to
20 match a child with special needs with a guardian ad litem who has
21 specific training or education related to the child's individual needs.

22 (2) If the court does not have available to it a guardian ad litem
23 program with a sufficient number of volunteers, the court may appoint
24 a suitable person to act as guardian ad litem for the child under this
25 chapter. Another party to the proceeding or the party's employee or
26 representative shall not be so appointed.

27 (3) Each guardian ad litem program shall maintain a background
28 information record for each guardian ad litem in the program. The
29 background information record shall include, but is not limited to, the
30 following information:

- 31 (a) Level of formal education;
- 32 (b) General training related to the guardian ad litem's duties;
- 33 (c) Specific training related to issues potentially faced by
34 children in the dependency system;
- 35 (d) Specific training or education related to child disability or
36 developmental issues;
- 37 (e) Number of years' experience as a guardian ad litem;

1 (f) Number of appointments as a guardian ad litem and the county or
2 counties of appointment;

3 (g) The names of any counties in which the person was removed from
4 a guardian ad litem registry pursuant to a grievance action, and the
5 name of the court and the cause number of any case in which the court
6 has removed the person for cause;

7 (h) Founded allegations of abuse or neglect as defined in RCW
8 26.44.020;

9 (i) The results of an examination of state and national criminal
10 identification data. The examination shall consist of a background
11 check as allowed through the Washington state criminal records privacy
12 act under RCW 10.97.050, the Washington state patrol criminal
13 identification system under RCW 43.43.832 through 43.43.834, and the
14 federal bureau of investigation. The background check shall be done
15 through the Washington state patrol criminal identification section and
16 must include a national check from the federal bureau of investigation
17 based on the submission of fingerprints; and

18 (j) Criminal history, as defined in RCW 9.94A.030, for the period
19 covering ten years prior to the appointment.

20 The background information record shall be updated annually. As a
21 condition of appointment, the guardian ad litem's background
22 information record shall be made available to the court. If the
23 appointed guardian ad litem is not a member of a guardian ad litem
24 program a suitable person appointed by the court to act as guardian ad
25 litem shall provide the background information record to the court.

26 Upon appointment, the guardian ad litem, or guardian ad litem
27 program, shall provide the parties or their attorneys with a copy of
28 the background information record. The portion of the background
29 information record containing the results of the criminal background
30 check and the criminal history shall not be disclosed to the parties or
31 their attorneys. The background information record shall not include
32 identifying information that may be used to harm a guardian ad litem,
33 such as home addresses and home telephone numbers, and for volunteer
34 guardians ad litem the court may allow the use of maiden names or
35 pseudonyms as necessary for their safety.

36 (4) The appointment of the guardian ad litem shall remain in effect
37 until the court discharges the appointment or no longer has

1 jurisdiction, whichever comes first. The guardian ad litem may also be
2 discharged upon entry of an order of guardianship.

3 (5) A guardian ad litem through counsel, or as otherwise authorized
4 by the court, shall have the right to present evidence, examine and
5 cross-examine witnesses, and to be present at all hearings. A guardian
6 ad litem shall receive copies of all pleadings and other documents
7 filed or submitted to the court, and notice of all hearings according
8 to court rules. The guardian ad litem shall receive all notice
9 contemplated for a parent or other party in all proceedings under this
10 chapter.

11 (6)(a) Pursuant to this subsection, the department or supervising
12 agency and the child's guardian ad litem shall each notify a child of
13 his or her right to request counsel and shall ask the child whether he
14 or she wishes to have counsel. The department or supervising agency
15 and the child's guardian ad litem shall notify the child and make this
16 inquiry immediately after:

17 (i) The date of the child's twelfth birthday;
18 (ii) Assignment of a case involving a child age twelve or older; or
19 (iii) July 1, 2010, for a child who turned twelve years old before
20 July 1, 2010.

21 (b) The department or supervising agency and the child's guardian
22 ad litem shall repeat the notification and inquiry at least annually
23 and upon the filing of any motion or petition affecting the child's
24 placement, services, or familial relationships.

25 (c) The notification and inquiry is not required if the child has
26 already been appointed counsel.

27 (d) The department or supervising agency shall note in the child's
28 individual service and safety plan, and the guardian ad litem shall
29 note in his or her report to the court, that the child was notified of
30 the right to request counsel and indicate the child's position
31 regarding appointment of counsel.

32 (e) At the first regularly scheduled hearing after:

33 (i) The date of the child's twelfth birthday;
34 (ii) The date that a dependency petition is filed pursuant to this
35 chapter on a child age twelve or older; or
36 (iii) July 1, 2010, for a child who turned twelve years old before
37 July 1, 2010;

1 the court shall inquire whether the child has received notice of
2 his or her right to request legal counsel from the department or
3 supervising agency and the child's guardian ad litem. The court shall
4 make an additional inquiry at the first regularly scheduled hearing
5 after the child's fifteenth birthday. No inquiry is necessary if the
6 child has already been appointed counsel.

7 (f) If the child requests legal counsel and is age twelve or older,
8 or if the guardian ad litem or the court determines that the child
9 needs to be independently represented by counsel, the court may appoint
10 an attorney to represent the child's position.

11 (7) For the purposes of child abuse prevention and treatment act
12 (42 U.S.C. Secs. 5101 et seq.) grants to this state under P.L. 93-247,
13 or any related state or federal legislation, a person appointed
14 pursuant to (~~RCW 13.34.100~~) this section shall be deemed a guardian
15 ad litem to represent the best interests of the minor in proceedings
16 before the court.

17 (8) When a court-appointed special advocate or volunteer guardian
18 ad litem is requested on a case, the program shall give the court the
19 name of the person it recommends. The program shall attempt to match
20 a child with special needs with a guardian ad litem who has specific
21 training or education related to the child's individual needs. The
22 court shall immediately appoint the person recommended by the program.

23 (9) If a party in a case reasonably believes the court-appointed
24 special advocate or volunteer guardian ad litem is inappropriate or
25 unqualified, the party may request a review of the appointment by the
26 program. The program must complete the review within five judicial
27 days and remove any appointee for good cause. If the party seeking the
28 review is not satisfied with the outcome of the review, the party may
29 file a motion with the court for the removal of the court-appointed
30 special advocate or volunteer guardian ad litem on the grounds the
31 advocate or volunteer is inappropriate or unqualified.

32 **Sec. 3.** RCW 13.34.105 and 2008 c 267 s 13 are each amended to read
33 as follows:

34 (1) Unless otherwise directed by the court, the duties of the
35 guardian ad litem for a child subject to a proceeding under this
36 chapter, including an attorney specifically appointed by the court to

1 serve as a guardian ad litem, include but are not limited to the
2 following:

3 (a) To investigate, collect relevant information about the child's
4 situation, and report to the court factual information regarding the
5 best interests of the child;

6 (b) To meet with, interview, or observe the child, depending on the
7 child's age and developmental status, and report to the court any views
8 or positions expressed by the child on issues pending before the court;

9 (c) To monitor all court orders for compliance and to bring to the
10 court's attention any change in circumstances that may require a
11 modification of the court's order;

12 (d) To report to the court information on the legal status of a
13 child's membership in any Indian tribe or band;

14 (e) Court-appointed special advocates and guardians ad litem may
15 make recommendations based upon an independent investigation regarding
16 the best interests of the child, which the court may consider and weigh
17 in conjunction with the recommendations of all of the parties; (~~and~~)

18 (f) To represent and be an advocate for the best interests of the
19 child; and

20 (g) To inform the child, if the child is twelve years old or older,
21 of his or her right to request counsel and to ask the child whether he
22 or she wishes to have counsel, pursuant to RCW 13.34.100(6). The
23 guardian ad litem shall report to the court that the child was notified
24 of this right and indicate the child's position regarding appointment
25 of counsel. The guardian ad litem shall report to the court his or her
26 independent recommendation as to whether appointment of counsel is in
27 the best interest of the child.

28 (2) A guardian ad litem shall be deemed an officer of the court for
29 the purpose of immunity from civil liability.

30 (3) Except for information or records specified in RCW
31 13.50.100(7), the guardian ad litem shall have access to all
32 information available to the state or agency on the case. Upon
33 presentation of the order of appointment by the guardian ad litem, any
34 agency, hospital, school organization, division or department of the
35 state, doctor, nurse, or other health care provider, psychologist,
36 psychiatrist, police department, or mental health clinic shall permit
37 the guardian ad litem to inspect and copy any records relating to the
38 child or children involved in the case, without the consent of the

1 parent or guardian of the child, or of the child if the child is under
2 the age of thirteen years, unless such access is otherwise specifically
3 prohibited by law.

4 (4) A guardian ad litem may release confidential information,
5 records, and reports to the office of the family and children's
6 ombudsman for the purposes of carrying out its duties under chapter
7 43.06A RCW.

8 (5) The guardian ad litem shall release case information in
9 accordance with the provisions of RCW 13.50.100.

10 **Sec. 4.** RCW 13.34.215 and 2009 c 520 s 36 are each amended to read
11 as follows:

12 (1) A child may petition the juvenile court to reinstate the
13 previously terminated parental rights of his or her parent under the
14 following circumstances:

15 (a) The child was previously found to be a dependent child under
16 this chapter;

17 (b) The child's parent's rights were terminated in a proceeding
18 under this chapter;

19 (c) The child has not achieved his or her permanency plan within
20 three years of a final order of termination; and

21 (d) The child must be at least twelve years old at the time the
22 petition is filed. Upon the child's motion for good cause shown, or on
23 its own motion, the court may hear a petition filed by a child younger
24 than twelve years old.

25 (2) If the child is eligible to petition the juvenile court under
26 subsection (1) of this section and a parent whose rights have been
27 previously terminated contacts the department or supervising agency or
28 the child's guardian ad litem regarding reinstatement, the department
29 or supervising agency or the guardian ad litem must notify the eligible
30 child about his or her right to petition for reinstatement of parental
31 rights.

32 (3) A child seeking to petition under this section shall be
33 provided counsel at no cost to the child.

34 ((+3+)) (4) The petition must be signed by the child in the absence
35 of a showing of good cause as to why the child could not do so.

36 ((+4+)) (5) If, after a threshold hearing to consider the parent's
37 apparent fitness and interest in reinstatement of parental rights, the

1 court finds by a preponderance of the evidence that the best interests
2 of the child may be served by reinstatement of parental rights, the
3 juvenile court shall order that a hearing on the merits of the petition
4 be held.

5 ~~((+5+))~~ (6) The court shall give prior notice for any proceeding
6 under this section, or cause prior notice to be given, to the
7 department or the supervising agency, the child's attorney, and the
8 child. The court shall also order the department or supervising agency
9 to give prior notice of any hearing to the child's former parent whose
10 parental rights are the subject of the petition, any parent whose
11 rights have not been terminated, the child's current foster parent,
12 relative caregiver, guardian or custodian, and the child's tribe, if
13 applicable.

14 ~~((+6+))~~ (7) The juvenile court shall conditionally grant the
15 petition if it finds by clear and convincing evidence that the child
16 has not achieved his or her permanency plan and is not likely to
17 imminently achieve his or her permanency plan and that reinstatement of
18 parental rights is in the child's best interest. In determining
19 whether reinstatement is in the child's best interest the court shall
20 consider, but is not limited to, the following:

21 (a) Whether the parent whose rights are to be reinstated is a fit
22 parent and has remedied his or her deficits as provided in the record
23 of the prior termination proceedings and prior termination order;

24 (b) The age and maturity of the child, and the ability of the child
25 to express his or her preference;

26 (c) Whether the reinstatement of parental rights will present a
27 risk to the child's health, welfare, or safety; and

28 (d) Other material changes in circumstances, if any, that may have
29 occurred which warrant the granting of the petition.

30 ~~((+7+))~~ (8) In determining whether the child has or has not
31 achieved his or her permanency plan or whether the child is likely to
32 achieve his or her permanency plan, the department or supervising
33 agency shall provide the court, and the court shall review, information
34 related to any efforts to achieve the permanency plan including efforts
35 to achieve adoption or a permanent guardianship.

36 ~~((+8+))~~ (9) (a) If the court conditionally grants the petition under
37 subsection ~~((+6+))~~ (7) of this section, the case will be continued for
38 six months and a temporary order of reinstatement entered. During this

1 period, the child shall be placed in the custody of the parent. The
2 department or supervising agency shall develop a permanency plan for
3 the child reflecting the plan to be reunification and shall provide
4 transition services to the family as appropriate.

5 (b) If the child must be removed from the parent due to abuse or
6 neglect allegations prior to the expiration of the conditional six-
7 month period, the court shall dismiss the petition for reinstatement of
8 parental rights if the court finds the allegations have been proven by
9 a preponderance of the evidence.

10 (c) If the child has been successfully placed with the parent for
11 six months, the court order reinstating parental rights remains in
12 effect and the court shall dismiss the dependency.

13 ~~((+9+))~~ (10) After the child has been placed with the parent for
14 six months, the court shall hold a hearing. If the placement with the
15 parent has been successful, the court shall enter a final order of
16 reinstatement of parental rights, which shall restore all rights,
17 powers, privileges, immunities, duties, and obligations of the parent
18 as to the child, including those relating to custody, control, and
19 support of the child. The court shall dismiss the dependency and
20 direct the clerk's office to provide a certified copy of the final
21 order of reinstatement of parental rights to the parent at no cost.

22 ~~((+10+))~~ (11) The granting of the petition under this section does
23 not vacate or otherwise affect the validity of the original termination
24 order.

25 ~~((+11+))~~ (12) Any parent whose rights are reinstated under this
26 section shall not be liable for any child support owed to the
27 department pursuant to RCW 13.34.160 or Title 26 RCW or costs of other
28 services provided to a child for the time period from the date of
29 termination of parental rights to the date parental rights are
30 reinstated.

31 ~~((+12+))~~ (13) A proceeding to reinstate parental rights is a
32 separate action from the termination of parental rights proceeding and
33 does not vacate the original termination of parental rights. An order
34 granted under this section reinstates the parental rights to the child.
35 This reinstatement is a recognition that the situation of the parent
36 and child have changed since the time of the termination of parental
37 rights and reunification is now appropriate.

1 (~~((13))~~) (14) This section is retroactive and applies to any child
2 who is under the jurisdiction of the juvenile court at the time of the
3 hearing regardless of the date parental rights were terminated.

4 (~~((14))~~) (15) The state, the department, the supervising agency,
5 and its employees are not liable for civil damages resulting from any
6 act or omission in the provision of services under this section, unless
7 the act or omission constitutes gross negligence. This section does
8 not create any duty and shall not be construed to create a duty where
9 none exists. This section does not create a cause of action against
10 the state, the department, the supervising agency, or its employees
11 concerning the original termination.

12 NEW SECTION. **Sec. 5.** By December 31, 2010, and within available
13 resources, the administrative office of the courts, working in
14 coordination with the state supreme court commission on children in
15 foster care, shall develop recommendations for voluntary training and
16 caseload standards for attorneys who represent youth in dependency
17 proceedings under chapter 13.34 RCW. The administrative office of the
18 courts shall report its recommendations to the appropriate committees
19 of the legislature by December 31, 2010.

 Passed by the House February 13, 2010.

 Passed by the Senate March 5, 2010.

 Approved by the Governor March 23, 2010.

 Filed in Office of Secretary of State March 23, 2010.

APPENDIX B

CHILDREN'S REPRESENTATION SUB-WORKGROUPS MEMBERSHIP LIST

B

Children's Representation Sub-Workgroups:

I. Caseload Standards

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APPENDIX C

AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES



AMERICAN BAR ASSOCIATION
STANDARDS OF PRACTICE FOR LAWYERS
WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES
Approved by the American Bar Association House of Delegates, February 5, 1996

PREFACE

All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues. These Abuse and Neglect Standards are meant to apply when a lawyer is appointed for a child in any legal action based on: (a) a petition filed for protection of the child; (b) a request to a court to change legal custody, visitation, or guardianship based on allegations of child abuse or neglect based on sufficient cause; or (c) an action to terminate parental rights.

These Standards apply only to lawyers and take the position that although a lawyer *may* accept appointment in the dual capacity of a "lawyer/guardian ad litem," the lawyer's primary duty must still be focused on the protection of the legal rights of the child client. The lawyer/guardian ad litem should therefore perform all the functions of a "child's attorney," except as otherwise noted.

These Standards build upon the ABA-approved JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1979) which include important directions for lawyers representing children in juvenile court matters generally, but do not contain sufficient guidance to aid lawyers representing children in abuse and neglect cases. These Abuse and Neglect Standards are also intended to help implement a series of ABA-approved policy resolutions (in Appendix) on the importance of legal representation and the improvement of lawyer practice in child protection cases.

In support of having lawyers play an active role in child abuse and neglect cases, in August 1995 the ABA endorsed a set of RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES produced by the National Council of Juvenile and Family Court Judges. The RESOURCE GUIDELINES stress the importance of quality representation provided by competent and diligent lawyers by supporting: 1) the approach of vigorous representation of child clients; and 2) the actions that courts should take to help assure such representation.

These Standards contain two parts. Part I addresses the specific roles and responsibilities of a lawyer appointed to represent a child in an abuse and neglect case. Part II provides a set of standards for judicial administrators and trial judges to assure high quality legal representation.

PART I— STANDARDS FOR THE CHILD'S ATTORNEY

A. DEFINITIONS

A-1. The Child's Attorney. The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.

Commentary

These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

A-2. Lawyer Appointed as Guardian Ad Litem. A lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences.

Commentary

In some jurisdictions the lawyer may be appointed as guardian ad litem. These Standards, however, express a clear preference for the appointment as the "child's attorney." These Standards address the lawyer's obligations to the child as client.

A lawyer appointed as guardian ad litem is almost inevitably expected to perform legal functions on behalf of the child. Where the local law permits, the lawyer is expected to act in the dual role of guardian ad litem and lawyer of record. The chief distinguishing factor between the roles is the manner and method to be followed in determining the legal position to be advocated. While a guardian ad litem should take the child's point of view into account, the child's preferences are not binding, irrespective of the child's age and the ability or willingness of the child to express preferences. Moreover, in many states, a guardian ad litem may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a "lawyer."

These Standards do not apply to nonlawyers when such persons are appointed as guardians ad litem or as "court appointed special advocates" (CASA). The nonlawyer guardian ad litem cannot and should not be expected to perform any legal functions on behalf of a child.

A-3. Developmentally Appropriate. "Developmentally appropriate" means that the child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, level of education, cultural context, and degree of language acquisition.

Commentary

The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning and consequences of action. See DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). A child client may not understand the legal terminology and for a variety of reasons may choose a particular course of action without fully appreciating the implications. With a child the potential for not understanding may be even greater. Therefore, the child's attorney has additional obligations based on the child's age, level of education, and degree of language acquisition. There is also the possibility that because of a particular child's developmental limitations, the lawyer may not completely understand the child's responses. Therefore, the child's attorney must learn how to ask developmentally appropriate questions and how to interpret the child's responses. See ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (ABA Center on Children and the Law 1994). The child's attorney may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

B. GENERAL AUTHORITY AND DUTIES

B-1. Basic Obligations. The child's attorney should:

- (1) Obtain copies of all pleadings and relevant notices;
- (2) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
- (3) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
- (4) Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
- (5) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;
- (6) Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
- (7) Identify appropriate family and professional resources for the child.

Commentary

The child's attorney should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. (The same is true for the guardian ad litem, although the position to be advocated may be different). In furtherance of that advocacy, the child's attorney must be adequately prepared prior to hearings. The lawyer's presence at and active participation in all hearings is absolutely critical. See, RESOURCE GUIDELINES, at 23.

Although the child's position may overlap with the position of one or both parents, third-party caretakers, or a state agency, the child's attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position.

While subsection (4) recognizes that delays are usually harmful, there may be some circumstances when delay may be beneficial. Section (7) contemplates that the child's attorney will identify counseling, educational and health services, substance abuse programs for the child and other family members, housing and other forms of material assistance for which the child may qualify under law. The lawyer can also identify family members, friends, neighbors, or teachers with whom the child feels it is important to maintain contact; mentoring programs, such as Big Brother/Big Sister; recreational opportunities that develop social skills and self-esteem; educational support programs; and volunteer opportunities which can enhance a child's self-esteem.

B-2. Conflict Situations. (1) If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem. The lawyer should request appointment of a guardian ad litem without revealing the basis for the request.

(2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Commentary

The primary conflict that arises between the two roles is when the child's expressed preferences differ from what the lawyer deems to be in the child's best interests. As a practical matter, when the lawyer has established a trusting relationship with the child, most conflicts can be avoided. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change an imprudent position or to identify alternative choices if the child's first choice is denied by the court.

The lawyer-client role involves a confidential relationship with privileged communications, while a

guardian ad litem-client role may not be confidential. Compare Alaska Bar Assoc. Ethics Op. #854 (1985) (lawyer-client privilege does not apply when the lawyer is appointed to be child's guardian ad litem) with Bentley v. Bentley, 448 N.Y.S.2d 559 (App. Div. 1982) (communication between minor children and guardian ad litem in divorce custody case is entitled to lawyer-client privilege). Because the child has a right to confidentiality and advocacy of his or her position, the child's attorney can never abandon this role. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as guardian ad litem. When the roles cannot be reconciled, another person must assume the guardian ad litem role. See Arizona State Bar Committee on Rules of Professional Conduct, Opinion No. 86-13 (1986).

B-3. Client Under Disability. The child's attorney should determine whether the child is "under a disability" pursuant to the Model Rules of Professional Conduct or the Model Code of Professional Responsibility with respect to each issue in which the child is called upon to direct the representation.

Commentary

These Standards do not accept the idea that children of certain ages are "impaired," "disabled," "incompetent," or lack capacity to determine their position in litigation. Further, these Standards reject the concept that any disability must be globally determined.

Rather, disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another. This Standard relies on empirical knowledge about competencies with respect to both adults and children. See, e.g., ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 217 (1989).

B-4. Client Preferences. The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.

Commentary

The lawyer has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determination of the particular position at issue. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying such recommendation. A child, however, may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships. Therefore, the lawyer needs to understand what the child knows and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child when deciding the best time to express his or her assessment of the case.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On one hand, the lawyer has a duty to ensure that the child client is given the information necessary to make an informed decision, including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the child. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by these Abuse and Neglect Standards or the Code of Professional Responsibility.

While the child is entitled to determine the overall objectives to be pursued, the child's attorney, as any adult's lawyer, may make certain decisions with respect to the manner of achieving those objectives, particularly with respect to procedural matters. These Abuse and Neglect Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client. Further, the Standards do not require the child's attorney to discuss with the child issues for which it is not feasible to obtain the child's direction because of the child's developmental limitations, as with an infant or preverbal child.

- (1) To the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request appointment of a guardian ad litem.

Commentary

There are circumstances in which a child is unable to express a position, as in the case of a preverbal child, or may not be capable of understanding the legal or factual issues involved. Under such circumstances, the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem.

- (2) To the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests.

Commentary

The child's failure to express a position is distinguishable from a directive that the lawyer not take a position with respect to certain issues. The child may have no opinion with respect to a particular issue, or may delegate the decision-making authority. For example, the child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the other parties. The lawyer should clarify with the child whether the child wants the lawyer to take a position or remain silent with respect to that issue or wants the preference expressed only if the parent or other party is out of the courtroom. The lawyer is then bound by the child's directive. The position taken by the lawyer should not contradict or undermine other issues about which the child has expressed a preference.

- (3) If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position.

Commentary

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of the parents, or because of threats. The child may choose to deal with a known situation rather than risk the unknown world of a

foster home or other out-of-home placement.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function. If the lawyer has taken the time to establish rapport with the child and gain that child's trust, it is likely that the lawyer will be able to persuade the child to abandon a dangerous position or at least identify an alternate course.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a guardian ad litem, who will be charged with advocating the child's best interests without being bound by the child's direction. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the guardian ad litem may never learn of the disclosed danger.

Confidentiality is abrogated for various professionals by mandatory child abuse reporting laws. Some states abrogate lawyer-client privilege by mandating reports. States which do not abrogate the privilege may permit reports notwithstanding professional privileges. The policy considerations underlying abrogation apply to lawyers where there is a substantial danger of serious injury or death. Under such circumstances, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules.

The lawyer may never counsel a client or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d), Model Rules of Professional Conduct, DR 7-102(A)(7), Model Code of Professional Responsibility. Further, existing ethical rules requires the lawyer to disclose confidential information to the extent necessary to prevent the client from committing a criminal act likely to result in death or substantial bodily harm, see ER 1.6(b), Model Rules of Professional Conduct, and permits the lawyer to reveal the intention of the client to commit a crime. See ER 1.6(c), Model Rules of Professional Conduct, DR 4-101(C)(3), Model Code of Professional Responsibility. While child abuse, including sexual abuse, are crimes, the child is presumably the victim, rather than the perpetrator of those crimes. Therefore, disclosure of confidences is designed to protect the client, rather than to protect a third party from the client. Where the child is in grave danger of serious injury or death, the child's safety must be the paramount concern.

The lawyer is not bound to pursue the client's objectives through means not permitted by law and ethical rules. See DR-7-101(A)(1), Model Code of Professional Responsibility. Further, lawyers may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

B-5. Child's Interests. The determination of the child's legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.

Commentary

A lawyer who is required to determine the child's interests is functioning in a nontraditional role by determining the position to be advocated independently of the client. The lawyer should base the position, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. The child's various needs and interests may be in conflict and must be weighed against each other. Even nonverbal children can communicate their needs and interests through their behaviors and developmental levels. See generally JAMES GARBARINO & FRANCES M. STOTT, WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992). The lawyer may seek the advice and consultation of experts and other knowledgeable people in both determining and weighing such needs and interests.

A child's legal interests may include basic physical and emotional needs, such as safety, shelter, food, and clothing. Such needs should be assessed in light of the child's vulnerability, dependence upon others, available external resources, and the degree of risk. A child needs family affiliation and stability of placement. The child's developmental level, including his or her sense of time, is relevant to an assessment of need. For example, a very young child may be less able to tolerate separation from a primary caretaker than an older child, and if separation is necessary, more frequent visitation than is ordinarily provided may be necessary.

In general, a child prefers to live with known people, to continue normal activities, and to avoid moving. To that end, the child's attorney should determine whether relatives, friends, neighbors, or other people known to the child are appropriate and available as placement resources. The lawyer must determine the child's feelings about the proposed caretaker, however, because familiarity does not automatically confer positive regard. Further, the lawyer may need to balance competing stability interests, such as living with a relative in another town versus living in a foster home in the same neighborhood. The individual child's needs will influence this balancing task.

In general, a child needs decisions about the custodial environment to be made quickly. Therefore, if the child must be removed from the home, it is generally in the child's best interests to have rehabilitative or reunification services offered to the family quickly. On the other hand, if it appears that reunification will be unlikely, it is generally in the child's best interests to move quickly toward an alternative permanent plan. Delay and indecision are rarely in a child's best interests.

In addition to the general needs and interests of children, individual children have particular needs, and the lawyer must determine the child client's individual needs. There are few rules which apply across the board to all children under all circumstances.

C. ACTIONS TO BE TAKEN

C-1. Meet With Child. Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

Commentary

Meeting with the child is important before court hearings and case reviews. In addition, changes in placement, school suspensions, in-patient hospitalizations, and other similar changes warrant meeting again with the child. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next. This also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to more creative solutions in the child's interest. A lawyer can learn a great deal from meeting with child clients, including a preverbal child. See, e.g., JAMES GARBARINO, ET AL, WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992).

C-2. Investigate. To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

- (1) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;

Commentary

Thorough, independent investigation of cases, at every stage of the proceedings, is a key aspect of providing competent representation to children. See, RESOURCE GUIDELINES, AT 23. The lawyer may need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those records which

pertain to the other parties. In some jurisdictions the statute or the order appointing the lawyer for the child includes provision for obtaining certain records.

- (2) Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;

Commentary

Another key aspect of representing children is the review of all documents submitted to the court as well as relevant agency case files and law enforcement reports. See, RESOURCE GUIDELINES, at 23. Other relevant files that should be reviewed include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted and may reveal alternate potential placements and services.

- (3) Contacting lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information;

Commentary

The other parties' lawyers may have information not included in any of the available records. Further, they can provide information on their respective clients' perspectives. The CASA is typically charged with performing an independent factual investigation, getting to know the child, and speaking up to the court on the child's "best interests." Volunteer CASAs may have more time to perform their functions than the child's attorney and can often provide a great deal of information to assist the child's attorney. Where there appears to be role conflict or confusion over the involvement of both a child's attorney and CASA in the same case, there should be joint efforts to clarify and define mutual responsibilities. See, RESOURCE GUIDELINES, at 24.

- (4) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;

Commentary

Such contact generally should include visiting the home, which will give the lawyer additional information about the child's custodial circumstances.

- (5) Obtaining necessary authorizations for the release of information;

Commentary

If the relevant statute or order appointing the lawyer for the child does not provide explicit authorization for the lawyer's obtaining necessary records, the lawyer should attempt to obtain authorizations for release of information from the agency and from the parents, with their lawyer's consent. Even if it is not required, an older child should be asked to sign authorizations for release of his or her own records, because such a request demonstrates the lawyer's respect for the client's authority over information.

- (6) Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

Commentary

In some jurisdictions the child's attorney is permitted free access to agency case workers. In others, contact with the case worker must be arranged through the agency's lawyer.

- (7) Reviewing relevant photographs, video or audio tapes and other evidence; and

Commentary

It is essential that the lawyer review the evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of the evidence.

- (8) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.

Commentary

While some courts will not authorize compensation for the child's attorney to attend such collateral meetings, such attendance is often very important. The child's attorney can present the child's perspective at such meetings, as well as gather information necessary to proper representation. In some cases the child's attorney can be pivotal in achieving a negotiated settlement of all or some issues. The child's attorney may not need to attend collateral meetings if another person involved in the case, such as a social worker who works the lawyer, can get the information or present the child's perspective.

C-3. File Pleadings. The child's attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

- (1) A mental or physical examination of a party or the child;
- (2) A parenting, custody or visitation evaluation;
- (3) An increase, decrease, or termination of contact or visitation;
- (4) Restraining or enjoining a change of placement;
- (5) Contempt for non-compliance with a court order;
- (6) Termination of the parent-child relationship;
- (7) Child support;
- (8) A protective order concerning the child's privileged communications or tangible or intangible property;
- (9) Request services for child or family; and
- (10) Dismissal of petitions or motions.

Commentary

Filing and arguing necessary motions is an essential part of the role of a child's attorney. See, RESOURCE GUIDELINES, at 23. Unless the lawyer is serving in a role which explicitly precludes the filing of pleadings, the lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of the other parties. The filing of such pleadings can ensure that appropriate issues are properly before the court and can expedite the court's consideration of issues important to the child's interests. In some jurisdictions, guardians ad litem are not permitted to file pleadings, in which case it should be clear to the lawyer that he or she is not the "child's attorney" as defined in these Standards.

C-4. Request Services. Consistent with the child's wishes, the child's attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:

- (1) Family preservation-related prevention or reunification services;
- (2) Sibling and family visitation;
- (3) Child support;
- (4) Domestic violence prevention, intervention, and treatment;
- (5) Medical and mental health care;
- (6) Drug and alcohol treatment;
- (7) Parenting education;
- (8) Semi-independent and independent living services;

- (9) Long-term foster care;
- (10) Termination of parental rights action;
- (11) Adoption services;
- (12) Education;
- (13) Recreational or social services; and
- (14) Housing.

Commentary

The lawyer should request appropriate services even if there is no hearing scheduled. Such requests may be made to the agency or treatment providers, or if such informal methods are unsuccessful, the lawyer should file a motion to bring the matter before the court. In some cases the child's attorney should file collateral actions, such as petitions for termination of parental rights, if such an action would advance the child's interest and is legally permitted and justified. Different resources are available in different localities.

C-5. Child With Special Needs. Consistent with the child's wishes, the child's attorney should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:

- (1) Special education and related services;
- (2) Supplemental security income (SSI) to help support needed services;
- (3) Therapeutic foster or group home care; and
- (4) Residential/in-patient and out-patient psychiatric treatment.

Commentary

There are many services available from extra-judicial, as well as judicial, sources for children with special needs. The child's attorney should be familiar with these other services and how to assure their availability for the client. See generally, THOMAS A. JACOBS, CHILDREN & THE LAW: RIGHTS & OBLIGATIONS (1995); LEGAL RIGHTS OF CHILDREN (2d ed. Donald T. Kramer, ed., 1994).

C-6. Negotiate Settlements. The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's attorney should use suitable mediation resources.

Commentary

Particularly in contentious cases, the child's attorney may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child. If a parent is legally represented, it is unethical for the child's attorney to negotiate with a parent directly without the consent of the parent's lawyer. Because the court is likely to resolve at least some parts of the dispute in question based on the best interests of the child, the child's attorney is in a pivotal position in negotiation.

Settlement frequently obtains at least short term relief for all parties involved and is often the best resolution of a case. The child's attorney, however, should not become merely a facilitator to the parties' reaching a negotiated settlement. As developmentally appropriate, the child's attorney should consult the child prior to any settlement becoming binding.

D. HEARINGS

D-1. Court Appearances. The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

D-2. Client Explanation. The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

D-3. Motions and Objections. The child's attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the child's attorney should file briefs in support of evidentiary issues. Further, during all hearings, the child's attorney should preserve legal issues for appeal, as appropriate.

D-4. Presentation of Evidence. The child's attorney should present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary.

Commentary

The child's position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the child's attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position (consistent with Standard B-6), and not a mere endorsement of another party's position.

D-5. Child at Hearing. In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.

Commentary

A child has the right to meaningful participation in the case, which generally includes the child's presence at significant court hearings. Further, the child's presence underscores for the judge that the child is a real party in interest in the case. It may be necessary to obtain a court order or writ of habeas corpus ad testificandum to secure the child's attendance at the hearing.

A decision to exclude the child from the hearing should be made based on a particularized determination that the child does not want to attend, is too young to sit through the hearing, would be severely traumatized by such attendance, or for other good reason would be better served by nonattendance. There may be other extraordinary reasons for the child's non-attendance. The lawyer should consult the child, therapist, caretaker, or any other knowledgeable person in determining the effect on the child of being present at the hearing. In some jurisdictions the court requires an affirmative waiver of the child's presence if the child will not attend. Even a child who is too young to sit through the hearing may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making the decisions. The lawyer should provide the court with any required notice that the child will be present. Concerns about the child being exposed to certain parts of the evidence may be addressed by the child's temporary exclusion from the court room during the taking of that evidence, rather than by excluding the child from the entire hearing.

The lawyer should ensure that the state/ custodian meets its obligation to transport the child to and from the hearing. Similarly, the lawyer should ensure the presence of someone to accompany the child any time the child is temporarily absent from the hearing.

D-6. Whether Child Should Testify. The child's attorney should decide whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and

withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying.

Commentary

There are no blanket rules regarding a child's testimony. While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. Therefore, the decision about the child's testifying should be made individually, based on the circumstances of the individual child and the individual case. The child's therapist, if any, should be consulted both with respect to the decision itself and assistance with preparation. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so. See ANN M. HARALAMBIE, THE CHILD'S LAWYER: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES ch. 4 (1993). If the child should not wish to testify or would be harmed by being forced to testify, the lawyer should seek a stipulation of the parties not to call the child as a witness or seek a protective order from the court. If the child is compelled to testify, the lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by local law, such as having the testimony taken informally, in chambers, without presence of the parents. See JOHN E.B. MYERS, 2 EVIDENCE IN CHILD ABUSE AND NEGLECT CASES ch. 8 (1992). The child should know whether the in-chambers testimony will be shared with others, such as parents who might be excluded from chambers, before agreeing to this forum. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes which will not be the child's fault.

D-7. Child Witness. The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

Commentary

The lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities as well as to accommodations which should be made by the court and other lawyers. The lawyer should seek any necessary assistance from the court, including location of the testimony (in chambers, at a small table etc.), determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child.

The accuracy of children's testimony is enhanced when they feel comfortable. See, generally, Karen Saywitz, Children in Court: Principles of Child Development for Judicial Application, in A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE 15 (Josephine Bulkley & Claire Sandt, eds., 1994). Courts have permitted support persons to be present in the courtroom, sometimes even with the child sitting on the person's lap to testify. Because child abuse and neglect cases are often closed to the public, special permission may be necessary to enable such persons to be present during hearings. Further, where the rule sequestering witnesses has been invoked, the order of witnesses may need to be changed or an exemption granted where the support person also will be a witness. The child should be asked whether he or she would like someone to be present, and if so, whom the child prefers. Typical support persons include parents, relatives, therapists, Court Appointed Special Advocates (CASA), social workers, victim-witness advocates, and members of the clergy. For some, presence of the child's attorney provides sufficient support.

D-8. Questioning the Child. The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

Commentary

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory, and suggestibility. See generally, Karen Saywitz, supra D -7; CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY (Gail S. Goodman & Bette L. Bottoms, eds. 1993); ANN HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES 24.09v24.22 (2nd ed. 1993); MYERS,

supra D-6, at Vol. 1, ch 2; Ellen Matthews & Karen Saywitz, *Child Victim Witness Manual*, 12/1 C.J.E.R.J. 40 (1992).

The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. See WALKER, SUPRA, A-3 Commentary. The child's attorney must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

D-9. Challenges to Child's Testimony/Statements. The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary

*Many jurisdictions have abolished presumptive ages of competency. See HARALAMBIE, SUPRA D-8 AT 24.17. The jurisdictions which have rejected presumptive ages for testimonial competency have applied more flexible, case-by-case analyses. See Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AM. ACAD. MATRIM. LAW. 45, 48 (Winter 1993). Competency to testify involves the abilities to perceive and relate.*

*If necessary, the child's attorney should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases. See generally, Karen Saywitz, *supra* D-8 at 15; CHILD VICTIMS, SUPRA D-8; Haralambie, *supra* D-8; J. MYERS, SUPRA D-8; Matthews & Saywitz, *supra* D-8.*

D-10. Jury Selection. In those states in which a jury trial is possible, the child's attorney should participate in jury selection and drafting jury instructions.

D-11. Conclusion of Hearing. If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

Commentary

One of the values of having a trained child's attorney is such a lawyer can often present creative alternative solutions to the court. Further, the child's attorney is able to argue the child's interests from the child's perspective, keeping the case focused on the child's needs and the effect of various dispositions on the child.

D-12. Expanded Scope of Representation. The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example:

- (1) Child support;
- (2) Delinquency or status offender matters;
- (3) SSI and other public benefits;
- (4) Custody;
- (5) Guardianship;
- (6) Paternity;
- (7) Personal injury;
- (8) School/education issues, especially for a child with disabilities;
- (9) Mental health proceedings;
- (10) Termination of parental rights; and

(11) Adoption.

Commentary

The child's interests may be served through proceedings not connected with the case in which the child's attorney is participating. In such cases the lawyer may be able to secure assistance for the child by filing or participating in other actions. See, e.g., In re Appeal in Pima County Juvenile Action No. S-113432, 872 P.2d 1240 (Ariz. Ct. App. 1994). With an older child or a child with involved parents, the child's attorney may not need court authority to pursue other services. For instance, federal law allows the parent to control special education. A Unified Child and Family Court Model would allow for consistency of representation between related court proceedings, such as mental health or juvenile justice.

D-13. Obligations after Disposition. The child's attorney should seek to ensure continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

Commentary

Representing a child should reflect the passage of time and the changing needs of the child. The bulk of the child's attorney's work often comes after the initial hearing, including ongoing permanency planning issues, six month reviews, case plan reviews, issues of termination, and so forth. The average length of stay in foster care is over five years in some jurisdictions. Often a child's case workers, therapists, other service providers or even placements change while the case is still pending. Different judges may hear various phases of the case. The child's attorney may be the only source of continuity for the child. Such continuity not only provides the child with a stable point of contact, but also may represent the institutional memory of case facts and procedural history for the agency and court. The child's attorney should stay in touch with the child, third party caretakers, case workers, and service providers throughout the term of appointment to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

Generally it is preferable for the lawyer to remain involved so long as the case is pending to enable the child's interest to be addressed from the child's perspective at all stages. Like the JUVENILE JUSTICE STANDARDS, these ABUSE AND NEGLECT STANDARDS require ongoing appointment and active representation as long as the court retains jurisdiction over the child. To the extent that these are separate proceedings in some jurisdictions, the child's attorney should seek reappointment. Where reappointment is not feasible, the child's attorney should provide records and information about the case and cooperate with the successor to ensure continuity of representation.

E. POST-HEARING

E-1. Review of Court's Order. The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

E-2. Communicate Order to Child. The child's attorney should discuss the order and its consequences with the child.

Commentary

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children may assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out. For example, an order may permit the agency to return the child to the parent if certain goals are accomplished.

E-3. Implementation. The child's attorney should monitor the implementation of the court's orders and communicate

to the responsible agency and, if necessary, the court, any non-compliance.

Commentary

The lawyer should ensure that services are provided and that the court's orders are implemented in a complete and timely fashion. In order to address problems with implementation, the lawyer should stay in touch with the child, case worker, third party caretakers, and service providers between review hearings. The lawyer should consider filing any necessary motions, including those for civil or criminal contempt, to compel implementation. See, RESOURCE GUIDELINES, at 23.

F. APPEAL

F-1. Decision to Appeal. The child's attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal has merit, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

Commentary

The lawyer should explain to the child not only the legal possibility of an appeal, but also the ramifications of filing an appeal, including the potential for delaying implementation of services or placement options. The lawyer should also explain whether the trial court's orders will be stayed pending appeal and what the agency and trial court may do pending a final decision.

F-2. Withdrawal. If the child's attorney determines that an appeal would be frivolous or that he or she lacks the necessary experience or expertise to handle the appeal, the lawyer should notify the court and seek to be discharged or replaced.

F-3. Participation in Appeal. The child's attorney should participate in an appeal filed by another party unless discharged.

Commentary

The child's attorney should take a position in any appeal filed by the parent, agency, or other party. In some jurisdictions, the lawyer's appointment does not include representation on appeal. If the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel to represent the child's position in the appeal.

F-4. Conclusion of Appeal. When the decision is received, the child's attorney should explain the outcome of the case to the child.

Commentary

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appellate decision. In addition, the lawyer should explain whether there are further appellate remedies and what more, if anything, will be done in the trial court following the decision.

F-5. Cessation of Representation. The child's attorney should discuss the end of the legal representation and determine what contacts, if any, the child's attorney and the child will continue to have.

Commentary

When the representation ends, the child's lawyer should explain in a developmentally appropriate manner why the representation is ending and how the child can obtain assistance in the future should it become necessary. It is important for there to be closure between the child and the lawyer.

PART II– ENHANCING THE JUDICIAL ROLE IN CHILD REPRESENTATION

PREFACE

Enhancing the legal representation provided by court-appointed lawyers for children has long been a special concern of the American Bar Association [see, e.g., JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1979); ABA Policy Resolutions on Representation of Children (Appendix)]. Yet, no matter how carefully a bar association, legislature, or court defines the duties of lawyers representing children, practice will only improve if judicial administrators and trial judges play a stronger role in the selection, training, oversight, and prompt payment of court-appointed lawyers in child abuse/neglect and child custody/visitation cases.

The importance of the court's role in helping assure competent representation of children is noted in the JUVENILE JUSTICE STANDARDS RELATING TO COURT ORGANIZATION AND ADMINISTRATION (1980) which state in the Commentary to 3.4D that effective representation of parties is "essential" and that the presiding judge of a court "might need to use his or her position to achieve" it. In its RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995), the National Council of Juvenile and Family Court Judges stated, "Juvenile and family courts should take active steps to ensure that the parties in child abuse and neglect cases have access to competent representation. . . ." In jurisdictions which engage nonlawyers to represent a child's interests, the court should ensure they have access to legal representation.

These Abuse and Neglect Standards, like the RESOURCE GUIDELINES, recognize that the courts have a great ability to influence positively the quality of counsel through setting judicial prerequisites for lawyer appointments including requirements for experience and training, imposing sanctions for violation of standards (such as terminating a lawyer's appointment to represent a specific child, denying further appointments, or even fines or referrals to the state bar committee for professional responsibility). The following Standards are intended to assist the judiciary in using its authority to accomplish the goal of quality representation for all children before the court in abuse/neglect related proceedings.

G. THE COURT'S ROLE IN STRUCTURING CHILD REPRESENTATION

G-1. Assuring Independence of the Child's Attorney. The child's attorney should be independent from the court, court services, the parties, and the state.

Commentary

To help assure that the child's attorney is not compromised in his or her independent action, these Standards propose that the child's lawyer be independent from other participants in the litigation.

"Independence" does not mean that a lawyer may not receive payment from a court, a government entity (e.g., program funding from social services or justice agencies), or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action. For ethical conflict reasons, however, lawyers should never accept compensation as retained counsel for the child from a parent accused of abusing or neglecting the child. The child's attorney should not prejudge the case. The concept of independence includes being free from prejudice and other limitations to uncompromised representation.

JUVENILE JUSTICE STANDARD 2.1(d) states that plans for providing counsel for children "must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship." The Commentary strongly asserts there is "no justification for . . . judicial preference" to compromise a lawyer's relationship with the child client and notes the "willingness of some judges to direct lawyers' performance and thereby compromise their independence."

G-2. Establishing Uniform Representation Rules. The administrative office for the state trial, family, or juvenile court system should cause to be published and disseminated to all relevant courts a set of uniform,

written rules and procedures for court-appointed lawyers for minor children.

Commentary

Although uniform rules of court to govern the processing of various types of child-related judicial proceedings have become common, it is still rare for those rules to address comprehensively the manner and scope of representation for children. Many lawyers representing children are unclear as to the court's expectations. Courts in different communities, or even judges within the same court, may have differing views regarding the manner of child representation. These Standards promote statewide uniformity by calling for written publication and distribution of state rules and procedures for the child's attorney.

G-3. Enhancing Lawyer Relationships with Other Court Connected Personnel. Courts that operate or utilize Court Appointed Special Advocate (CASA) and other nonlawyer guardians ad litem, and courts that administer nonjudicial foster care review bodies, should assure that these programs and the individuals performing those roles are trained to understand the role of the child's attorney. There needs to be effective coordination of their efforts with the activities of the child's attorney, and they need to involve the child's attorney in their work. The court should require that reports from agencies be prepared and presented to the parties in a timely fashion.

Commentary

Many courts now regularly involve nonlawyer advocates for children in various capacities. Some courts also operate programs that, outside of the courtroom, review the status of children in foster care or other out-of-home placements. It is critical that these activities are appropriately linked to the work of the child's attorney, and that the court through training, policies, and protocols helps assure that those performing the nonlegal tasks (1) understand the importance and elements of the role of the child's attorney, and (2) work cooperatively with such lawyers. The court should keep abreast of all the different representatives involved with the child, the attorney, social worker for government or private agency, CASA volunteer, guardian ad litem, school mediator, counselors, etc.

H. THE COURT'S ROLE IN APPOINTING THE CHILD'S ATTORNEY

H-1. Timing of Appointments. The child's attorney should be appointed immediately after the earliest of:

- (1) The involuntary removal of the child for placement due to allegations of neglect, abuse or abandonment;
- (2) The filing of a petition alleging child abuse and neglect, for review of foster care placement, or for termination of parental rights; or
- (3) Allegations of child maltreatment, based upon sufficient cause, are made by a party in the context of proceedings that were not originally initiated by a petition alleging child maltreatment.

Commentary

These ABUSE AND NEGLECT STANDARDS take the position that courts must assure the appointment of a lawyer for a child as soon as practical (ideally, on the day the court first has jurisdiction over the case, and hopefully, no later than the next business day). The three situations are described separately because:

- (1) A court may authorize, or otherwise learn of, a child's removal from home prior to the time a formal petition is instituted. Lawyer representation of (and, ideally, contact with) the child prior to the initial court hearing following removal (which in some cases may be several days) is important to protect the child's interests;*
- (2) Once a petition has been filed by a government agency (or, where authorized, by a hospital or other agency with child protection responsibilities), for any reason related to a child's need for protection, the child should have prompt access to a lawyer; and*

(3) There are cases (such as custody, visitation, and guardianship disputes and family-related abductions of children) where allegations, with sufficient cause, of serious physical abuse, sexual molestation, or severe neglect of a child are presented to the court not by a government agency (i.e., child protective services) but by a parent, guardian, or other relative. The need of a child for competent, independent representation by a lawyer is just as great in situation (3) as with cases in areas (1) and (2).

H-2. Entry of Compensation Orders. At the time the court appoints a child's attorney, it should enter a written order addressing compensation and expense costs for that lawyer, unless these are otherwise formally provided for by agreement or contract with the court, or through another government agency.

Commentary

Compensation and expense reimbursement of individual lawyers should be addressed in a specific written court order is based on a need for all lawyers representing maltreated children to have a uniform understanding of how they will be paid. Commentary to Section 2.1(b) of the JUVENILE JUSTICE STANDARDS observes that it is common for court-appointed lawyers to be confused about the availability of reimbursement of expenses for case-related work.

H-3. Immediate Provision of Access. Unless otherwise provided for, the court should upon appointment of a child's attorney, enter an order authorizing that lawyer access between the child and the lawyer and to all privileged information regarding the child, without the necessity of a further release. The authorization should include, but not be limited to: social services, psychiatric, psychological treatment, drug and alcohol treatment, medical, evaluation, law enforcement, and school records.

Commentary

Because many service providers do not understand or recognize the nature of the role of the lawyer for the child or that person's importance in the court proceeding, these Standards call for the routine use of a written court order that clarifies the lawyers right to contact with their child client and perusal of child-related records. Parents, other caretakers, or government social service agencies should not unreasonably interfere with a lawyer's ability to have face-to-face contact with the child client nor to obtain relevant information about the child's social services, education, mental health, etc. Such interference disrupts the lawyer's ability to control the representation and undermines his or her independence as the child's legal representative.

H-4. Lawyer Eligibility for and Method of Appointment. Where the court makes individual appointment of counsel, unless impractical, before making the appointment, the court should determine that the lawyer has been trained in representation of children and skilled in litigation (or is working under the supervision of an lawyer who is skilled in litigation). Whenever possible, the trial judge should ensure that the child's attorney has had sufficient training in child advocacy and is familiar with these Standards. The trial judge should also ensure that (unless there is specific reason to appoint a specific lawyer because of their special qualifications related to the case, or where a lawyer's current caseload would prevent them from adequately handling the case) individual lawyers are appointed from the ranks of eligible members of the bar under a fair, systematic, and sequential appointment plan.

Commentary

The JUVENILE JUSTICE STANDARDS 2.2(c) provides that where counsel is assigned by the court, this lawyer should be drawn from "an adequate pool of competent attorneys." In general, such competency can only be gained through relevant continuing legal education and practice-related experience. Those Standards also promote the use of a rational court appointment process drawing from the ranks of qualified lawyers. The Abuse and Neglect Standards reject the concept of ad hoc appointments of counsel that are made without regard to prior training or practice.

H-5. Permitting Child to Retain a Lawyer. The court should permit the child to be represented by a retained private lawyer if it determines that this lawyer is the child's independent choice, and such counsel should be substituted for the appointed lawyer. A person with a legitimate interest in the child's welfare may retain private counsel for the child and/or pay for such representation, and that person should be permitted to serve as the child's attorney, subject to approval of the court. Such approval should not be given if the child opposes the lawyer's representation or if the court determines that there will be a conflict of interest. The court should make it clear that the person paying for the retained lawyer does not have the right to direct the representation of the child or to receive privileged information about the case from the lawyer.

Commentary

Although such representation is rare, there are situations where a child, or someone acting on a child's behalf, seeks out legal representation and wishes that this lawyer, rather than one appointed by the court under the normal appointment process, be recognized as the sole legal representative of the child. Sometimes, judges have refused to accept the formal appearances filed by such retained lawyers. These Standards propose to permit, under carefully scrutinized conditions, the substitution of a court-appointed lawyer with the retained counsel for a child.

I. THE COURT'S ROLE IN LAWYER TRAINING

I-1. Judicial Involvement in Lawyer Training. Trial judges who are regularly involved in child-related matters should participate in training for the child's attorney conducted by the courts, the bar, or any other group.

Commentary

JUVENILE JUSTICE STANDARDS 2.1 indicates that it is the responsibility of the courts (among others) to ensure that competent counsel are available to represent children before the courts. That Standard further suggests that lawyers should "be encouraged" to qualify themselves for participation in child-related cases "through formal training." The Abuse and Neglect Standards go further by suggesting that judges should personally take part in educational programs, whether or not the court conducts them. The National Council of Juvenile and Family Court Judges has suggested that courts can play an important role in training lawyers in child abuse and neglect cases, and that judges and judicial officers can volunteer to provide training and publications for continuing legal education seminars. See, RESOURCE GUIDELINES, at 22.

I-2. Content of Lawyer Training. The appropriate state administrative office of the trial, family, or juvenile courts should provide educational programs, live or on tape, on the role of a child's attorney. At a minimum, the requisite training should include:

- (1) Information about relevant federal and state laws and agency regulations;
- (2) Information about relevant court decisions and court rules;
- (3) Overview of the court process and key personnel in child-related litigation;
- (4) Description of applicable guidelines and standards for representation;
- (5) Focus on child development, needs, and abilities;
- (6) Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in his or her home;
- (7) Information concerning family dynamics and dysfunction including substance abuse, and the use of kinship care;
- (8) Information on accessible child welfare, family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services; the structure of agencies providing such services as well as provisions and constraints related to agency payment for services; and
- (9) Provision of written material (e.g., representation manuals, checklists, sample forms), including

listings of useful material available from other sources.

Commentary

The ABUSE AND NEGLECT STANDARDS take the position that it is not enough that judges mandate the training of lawyers, or that judges participate in such training. Rather, they call upon the courts to play a key role in training by actually sponsoring (e.g., funding) training opportunities. The pivotal nature of the judiciary's role in educating lawyers means that courts may, on appropriate occasions, stop the hearing of cases on days when training is held so that both lawyers and judges may freely attend without docket conflicts. The required elements of training are based on a review of well-regarded lawyer training offered throughout the country, RESOURCE GUIDELINES, and many existing manuals that help guide lawyers in representing children.

I-3. Continuing Training for Lawyers. The court system should also assure that there are periodic opportunities for lawyers who have taken the "basic" training to receive continuing and "new developments" training.

Commentary

Many courts and judicial organizations recognize that rapid changes occur because of new federal and state legislation, appellate court decisions, systemic reforms, and responses to professional literature. Continuing education opportunities are critical to maintain a high level of performance. These Standards call for courts to afford these "advanced" or "periodic" training to lawyers who represent children in abuse and neglect related cases.

I-4. Provision of Mentorship Opportunities. Courts should provide individual court-appointed lawyers who are new to child representation the opportunity to practice under the guidance of a senior lawyer mentor.

Commentary

In addition to training, particularly for lawyers who work as sole practitioners or in firms that do not specialize in child representation, courts can provide a useful mechanism to help educate new lawyers for children by pairing them with more experienced advocates. One specific thing courts can do is to provide lawyers new to representing children with the opportunity to be assisted by more experienced lawyers in their jurisdiction. Some courts actually require lawyers to "second chair" cases before taking an appointment to a child abuse or neglect case. See, RESOURCE GUIDELINES, at 22.

J. THE COURT'S ROLE IN LAWYER COMPENSATION

J-1. Assuring Adequate Compensation. A child's attorney should receive adequate and timely compensation throughout the term of appointment that reflects the complexity of the case and includes both in court and out-of-court preparation, participation in case reviews and post-dispositional hearings, and involvement in appeals. To the extent that the court arranges for child representation through contract or agreement with a program in which lawyers represent children, the court should assure that the rate of payment for these legal services is commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities.

Commentary

JUVENILE JUSTICE STANDARDS 2.1(b) recognize that lawyers for children should be entitled to reasonable compensation for both time and services performed "according to prevailing professional standards," which takes into account the "skill required to perform...properly," and which considers the need for the lawyer to perform both counseling and resource identification/evaluation activities. The RESOURCE GUIDELINES, at 22, state that it is "necessary to provide reasonable compensation" for improved lawyer representation of children and that where necessary judges should "urge state legislatures and local governing bodies to provide sufficient funding" for quality legal representation.

Because some courts currently compensate lawyers only for time spent in court at the adjudicative or initial disposition stage of cases, these Standards clarify that compensation is to be provided for out-of-court preparation time, as well as for the lawyer's involvement in case reviews and appeals. "Out-of-court preparation" may include, for example, a lawyer's participation in social services or school case conferences relating to the client.

These Standards also call for the level of compensation where lawyers are working under contract with the court to provide child representation to be comparable with what experienced individual counsel would receive from the court. Although courts may, and are encouraged to, seek high quality child representation through enlistment of special children's law offices, law firms, and other programs, the motive should not be a significantly different (i.e., lower) level of financial compensation for the lawyers who provide the representation.

J-2. Supporting Associated Costs. The child's attorney should have access to (or be provided with reimbursement for experts, investigative services, paralegals, research costs, and other services, such as copying medical records, long distance phone calls, service of process, and transcripts of hearings as requested.

Commentary

The ABUSE AND NEGLECT STANDARDS expand upon JUVENILE JUSTICE STANDARDS 2.1(c) which recognizes that a child's attorney should have access to "investigatory, expert and other nonlegal services" as a fundamental part of providing competent representation.

J-3. Reviewing Payment Requests. The trial judge should review requests for compensation for reasonableness based upon the complexity of the case and the hours expended.

Commentary

These Standards implicitly reject the practice of judges arbitrarily "cutting down" the size of lawyer requests for compensation and would limit a judge's ability to reduce the amount of a per/case payment request from a child's attorney unless the request is deemed unreasonable based upon two factors: case complexity and time spent.

J-4. Keeping Compensation Levels Uniform. Each state should set a uniform level of compensation for lawyers appointed by the courts to represent children. Any per/hour level of compensation should be the same for all representation of children in all types of child abuse and neglect-related proceedings.

Commentary

These Standards implicitly reject the concept (and practice) of different courts within a state paying different levels of compensation for lawyers representing children. They call for a uniform approach, established on a statewide basis, towards the setting of payment guidelines.

K. THE COURT'S ROLE IN RECORD ACCESS BY LAWYERS

K-1. Authorizing Lawyer Access. The court should enter an order in child abuse and neglect cases authorizing the child's attorney access to all privileged information regarding the child, without the necessity for a further release.

Commentary

This Standard requires uniform judicial assistance to remove a common barrier to effective representation, i.e., administrative denial of access to significant records concerning the child. The language supports the universal issuance of broadly-worded court orders that grant a child's attorney full access to information (from individuals) or records (from agencies) concerning the child.

K-2. Providing Broad Scope Orders. The authorization order granting the child's attorney access to records should include social services, psychiatric, psychological treatment, drug and alcohol treatment, medical, evaluation, law enforcement, school, and other records relevant to the case.

Commentary

This Standard further elaborates upon the universal application that the court's access order should be given, by listing examples of the most common agency records that should be covered by the court order.

L. THE COURT'S ROLE IN ASSURING REASONABLE LAWYER CASELOADS

L-1. Controlling Lawyer Caseloads. Trial court judges should control the size of court-appointed caseloads of individual lawyers representing children, the caseloads of government agency-funded lawyers for children, or court contracts/agreements with lawyers for such representation. Courts should take steps to assure that lawyers appointed to represent children, or lawyers otherwise providing such representation, do not have such a large open number of cases that they are unable to abide by Part I of these Standards.

Commentary

THE ABUSE AND NEGLECT STANDARDS go further than JUVENILE JUSTICE STANDARD 2.2(b) which recognize the "responsibility of every defender office to ensure that its personnel can offer prompt, full, and effective counseling and representation to each (child) client" and that it "should not accept more assignments than its staff can adequately discharge" by specifically calling upon the courts to help keep lawyer caseloads from getting out of control. The Commentary to 2.2.(b) indicates that: Caseloads must not be exceeded where to do so would "compel lawyers to forego the extensive fact investigation required in both contested and uncontested cases, or to be less than scrupulously careful in preparation for trial, or to forego legal research necessary to develop a theory of representation." We would add: "...or to monitor the implementation of court orders and agency case plans in order to help assure permanency for the child."

L-2. Taking Supportive Caseload Actions. If judges or court administrators become aware that individual lawyers are close to, or exceeding, the levels suggested in these Standards, they should take one or more of the following steps:

- (1) Expand, with the aid of the bar and children's advocacy groups, the size of the list from which appointments are made;
- (2) Alert relevant government or private agency administrators that their lawyers have an excessive caseload problem;
- (3) Recruit law firms or special child advocacy law programs to engage in child representation;
- (4) Review any court contracts/agreements for child representation and amend them accordingly, so that additional lawyers can be compensated for case representation time; and
- (5) Alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently represent children pursuant to state-approved guidelines, and seek funds for increasing the number of lawyers available to represent children.

Commentary

This Standard provides courts with a range of possible actions when individual lawyer caseloads appear to be inappropriately high.

APPENDIX

Previous American Bar Association Policies Related to Legal Representation of Abused and Neglected Children

GUARDIANS AD LITEM FEBRUARY 1992

BE IT RESOLVED, that the American Bar Association urges:

(1) Every state and territory to meet the full intent of the Federal Child Abuse Prevention and Treatment Act, whereby every child in the United States who is the subject of a civil child protection related judicial proceedings will be represented at all stages of these proceedings by a fully-trained, monitored, and evaluated guardian ad litem in addition to appointed legal counsel.

(2) That state, territory and local bar associations and law schools become involved in setting standards of practice for such guardians ad litem, clarify the ethical responsibilities of these individuals and establish minimum ethical performance requirements for their work, and provide comprehensive multidisciplinary training for all who serve as such guardians ad litem.

(3) That in every state and territory, where judges are given discretion to appoint a guardian ad litem in private child custody and visitation related proceedings, the bench and bar jointly develop guidelines to aid judges in determining when such an appointment is necessary to protect the best interests of the child.

COURT-APPOINTED SPECIAL ADVOCATES AUGUST 1989

BE IT RESOLVED, that the American Bar Association endorses the concept of utilizing carefully selected, well trained lay volunteers, Court Appointed Special Advocates, in addition to providing attorney representation, in dependency proceedings to assist the court in determining what is in the best interests of abused and neglected children.

BE IT FURTHER RESOLVED, that the American Bar Association encourages its members to support the development of CASA programs in their communities.

COUNSEL FOR CHILDREN ENHANCEMENT FEBRUARY 1987

BE IT RESOLVED, that the American Bar Association requests State and local bar associations to determine the extent to which statutory law and court rules in their States guarantee the right to counsel for children in juvenile court proceedings; and

BE IT FURTHER RESOLVED, that State and local bar associations are urged to actively participate and support amendments to the statutory law and court rules in their State to bring them in to compliance with the Institute of Judicial Administration/American Bar Association Standards Relating to Counsel for Private Parties; and

BE IT FURTHER RESOLVED, that State and local bar associations are requested to ascertain the extent to which, irrespective of the language in their State statutory laws and court rules, counsel is in fact provided for children in juvenile court proceedings and the extent to which the quality of representation is consistent with the standards and policies of the American Bar Association; and

BE IT FURTHER RESOLVED, that State and local bar associations are urged to actively support programs of training and education to ensure that lawyers practicing in juvenile court are aware of the American Bar Association's standards relating to representation of children and provide advocacy which meets those standards.

BAR ASSOCIATION AND ATTORNEY ACTION
FEBRUARY 1984

BE IT RESOLVED, that the American Bar Association urges the members of the legal profession, as well as state and local bar associations, to respond to the needs of children by directing attention to issues affecting children including, but not limited to: ... (7) establishment of guardian ad litem programs.

BAR AND ATTORNEY INVOLVEMENT IN CHILD PROTECTION CASES
AUGUST 1981

BE IT RESOLVED, that the American Bar Association encourages individual attorneys and state and local bar organizations to work more actively to improve the handling of cases involving abused and neglected children as well as children in foster care. Specifically, attorneys should form appropriate committees and groups within the bar to ... work to assure quality legal representation for children....

JUVENILE JUSTICE STANDARDS
FEBRUARY 1979

BE IT RESOLVED, that the American Bar Association adopt (the volume of the) Standards for Juvenile Justice (entitled) Counsel for Private Parties...